

**DRAFT****October 19, 2004****SUBJECT: Provide for Greater Enforcement of Art in Private Development Requirements - Study Issue****EXECUTIVE SUMMARY**

The purpose of this report is to address issues raised in the 2004 Study Issue to "Provide Greater Enforcement of Art in Private Development Requirements." Please refer to Attachment A - 2004 Study Issue Paper. In order to ensure that there are legal and enforceable standards that will provide for continued unobstructed visibility of art that has been required as a condition of development, it is proposed that the art in private development regulations in the City's Municipal Code be amended. The purpose of the amendments is to address situations where:

- Art in private development is stolen or irreparably damaged or destroyed by natural causes, vandalism or negligence by the property owner or its representative, and;
- Actions are proposed by a property owner at a later date that may impair the public's ability to see the artwork.

Staff has tried to balance strategies that may be perceived by the business community as unreasonable requirements on private development, with the desire of the City to enhance the visual landscape of the community and mitigate the impact of large-scale developments.

Since the proposal of this Study Issue by the Arts Commission is predicated on two specific situations that have arisen in recent years, it is important to note that amendments to the art in private development ordinance resulting from action taken on this report will not be retroactive. Any changes to the regulations cannot be used to remedy pre-existing situations where artwork may have already been stolen or the public's ability to see an artwork has already been reduced or impaired. However, any changes to the regulations will affect the thirty seven pieces of public art that have been installed in the City as a condition of development or required under the art in private development ordinance.

FISCAL IMPACT

There may be some costs associated with the enforcement of this ordinance should enforcement be required; however, it is unlikely that there will be any significant costs associated with these regulations given the history of the program over the past thirteen years. Enforcement costs would be absorbed into the Neighborhood Preservation operating budget. If Council approves the alternative that would allow property owners to donate artwork to the City under certain conditions and restrictions, on-going maintenance costs would be incurred; however, the City's Public Art Fund could cover these costs.

PUBLIC CONTACT

Staff invited a group of business owners, developers, and business groups' to a meeting on August 27, 2004. At this meeting staff provided information regarding the purpose of the study issue and requested feedback on alternatives being considered to address the issues included in the study. The general consensus of the group was that any additional requirements related to the provision of art in private development would send an unwelcome signal to the business community, particularly if the result was an increase in the cost of doing business in Sunnyvale. In our current economic downturn the City needs to be competitive with surrounding cities to retain and attract businesses and to help current businesses expand. The total cost of doing business is a more sensitive issue. The participants felt that these problems can be mitigated substantially by making good decisions up front about placement, security, and damage-resistance of pieces of art on private development projects. A summary of the meeting is included in this report as Attachment B: Notes from Meeting with Business Representatives on Greater Enforcement of Art in Private Development Requirements. A meeting was conducted with the President and CEO of the Sunnyvale Chamber of Commerce on August 28, 2004. Feedback from this meeting was consistent with the opinions provided to staff during the meeting with other business representatives on August 27.

Public contact was also made through posting of the Arts Commission, Planning Commission and City Council agendas on the City's official web page, publication of the Council agenda in the San Jose Mercury News, and the availability of the report in the City Clerk's office, Library, Parks and Recreation Administration, and in the lobbies of the Recreation Center and Senior Center at the Sunnyvale Community Center complex.

A copy of the draft Report to Council was sent to the participants of the August 27 meeting and the Chamber of Commerce. A schedule of the upcoming Arts Commission, Planning Commission and City Council public hearings was also provided.

On March 17, 2004, a Study Session on this issue was conducted with the Arts Commission. During their meeting, Commissioners raised a number of additional questions:

1. Are developers currently required to insure public art that has been installed as a condition of development? *(No, developers are not currently required to insure public art on their property.)* If not, is it possible to require property owners to carry insurance on their artwork, so that resources are available to replace stolen or damaged artwork? *(Yes, the City may legally require property owners to carry insurance on their artwork. The way to do this would be to amend the art in private development regulations.)*
2. If a property owner must replace stolen or damaged artwork or conditions of the site have changed to such a degree that artwork may no longer be publicly visible, may the City offer the owner an in-lieu fee alternative at that time? *(Yes, the City may choose to offer an in-lieu fee alternative.)*

On September 20, 2004, the Planning Commission provided a public hearing on this matter during its regularly scheduled meeting.

On September 29, 2004, the Arts Commission held a public hearing on this matter during its regularly scheduled meeting.

RECOMMENDATIONS

Staff Recommendations

- ***Replacement of Stolen or Irreparably Damaged Art:***

Require property owners to replace artwork that is stolen or irreparably damaged. The original artwork would be replaced with an artwork that is similar in scale and appropriate to the site in accordance with the process described in Section 19.52.030. The decision of whether to replace the artwork with an artwork by the original artist, using a similar design, or to submit an entirely new proposal to the Arts Commission could be left to the property owner. If replacement of the artwork on the property is no longer feasible, the property owner may apply for an in-lieu fee alternative under Section 19.52.100(b) of the Municipal Code.

- ***Calculating the Value of Replacement Art or In-Lieu Fee Contribution***

The value of replacement art or in-lieu contribution would be based on the total insured value of the original artwork at the time of its theft, destruction or loss, including any applicable deductibles. If the artwork is not insured, use 1% of the construction valuation of the original project indexed to the Consumer Price Index for the Greater Bay Area. This amount would be reduced by the number of years that the public had an opportunity to enjoy the original artwork. It is unlikely that property owners would not carry general property

insurance for theft and damage of their property, so the fiscal impact on business would be negligible.

- ***Options to Address Changing Conditions on Property Where Art has been Required as a Condition of Development:***

Allow property owners to address changing conditions by providing three alternatives: (1) Apply to the Arts Commission to relocate the artwork to another site on the property as described in Section 19.52.030; (2) Apply for an in-lieu fee alternative as described in Section 19.52.100(b), or; (3) Apply to donate the artwork to the City of Sunnyvale and if the donation is accepted the owner would be responsible for all costs associated with the relocation and installation of the artwork. City would then cover the on-going maintenance and repair costs using resources held in the Public Art Fund.

- ***Apply Civil Penalties for Violation of the Art In Private Development Regulation:***

Amend Section 19.52.030(b) as follows: Failure to maintain the artwork as required by this Section is declared to be a public nuisance. If the artwork is not maintained in the manner prescribed, the City may, in addition to all other remedies provided by law, upon reasonable notice, perform all necessary maintenance and repairs, secure insurance, or take such legal or other action deemed necessary to preserve the artwork or restore it to good condition, and the costs therefore may be collected as provided in Chapter 9.26 as costs incurred to abate a public nuisance. Failure to maintain or replace artwork as required by this section may also subject the owner to administrative citations under Chapter 1.05 and/or civil penalties under Chapter 1.06. Proceedings under Chapter 1.06 shall be heard by an appeals board designated by the City Manager. The Director of Parks and Recreation and the Director of Community Development shall have concurrent authority to enforce provisions of this section.

- ***Other Changes in the Art in Private Development Ordinance:***

Require the property owner to record a document with the county recorder prior to issuance of the occupancy permit containing a description of the artwork and noting the obligation to present and future property owners with regard to the maintenance, repair and replacement of art.

Commissions Recommendations

The Planning Commission reviewed this report on September 20, 2004, and

The Arts Commission reviewed this report on September 29 2004, and

Attachments

- A. 2004 Study Issue Paper: Provide for Greater Enforcement of Art in Private Development Requirements.
- B. Notes from Meeting with Business Representatives Regarding Greater Enforcement of Art in Private Development Requirements.
- C. Revised Art Loan and Donation Legislative Policy.
- D. Municipal Code: Chapter 19.52. With Proposed Modifications Highlighted.

BACKGROUND

In 2003, staff reported to the Arts Commission a situation involving missing (stolen) artwork that had been installed under the City's Art in Private Development (AIPD) Program. Commissioners raised concerns about the property owner's responsibility for replacing the artwork, especially after discovering the property owner may possibly have recovered some of the cost of the stolen artwork from their insurance company. The existing art in private development ordinance requires that the property owner maintain the artwork after its installation and that no piece of required artwork may be removed except for maintenance or repair. However, there is nothing in the current AIPD policy that specifically calls for replacement of artwork that has been stolen or irreparably damaged.

The Commission has also expressed concern about a situation that arose when a company installed security fencing around their corporate campus following the September 11 terrorist attacks. The heightened security measures now prevent the public from entering the grounds and walking up to an artwork, which had been approved and installed in a location near the main visitors' entrance to the complex, but set back from the street. The artwork remains partially visible from outside the security fence; however, the Arts Commission had originally approved the artwork in a location slightly inside the company's grounds with the understanding that the campus would be open to the public. Due to the installation of security fencing the artwork is no longer physically accessible to the public and the view from the street does not provide an unobstructed view. While the current art in private development regulation requires that artwork be publicly visible, it does not require the artwork to be physically accessible to the general public.

To address these concerns, the Arts Commission proposed, and City Council approved, a Study Issue to:

1. Develop legal and enforceable standards to ensure continued public visibility and access to art installed as a requirement of the Art in Private Development program, and;

2. Develop legal and enforceable requirements for the continued maintenance of artwork provided by the AIPD program with a provision for monetary recovery (i.e. insurance) for damaged or stolen art to be used to either replace the artwork or be contributed to the City's art in-lieu fund as deemed appropriate by applying the in-lieu criteria on a case by case basis.

Please refer to Attachment A – 2004 Study Issue Paper: Provide for Greater Enforcement of Art in Private Development Requirements.

EXISTING POLICY

Sunnyvale General Plan Arts Sub-Element:

POLICY A.4.	Further a sense of community identity through the promotion of the Arts.
Action Statement A.4.c.	Explore with Arts Commission and Planning Commission ways to encourage continuation of a sense of community identity through the Arts.
GOAL E:	Create an aesthetically pleasing environment for Sunnyvale through use of functional and decorative art.
POLICY E.1.	Encourage alternative funding sources, funding strategies and incentives to provide and encourage the provision of art in public and private development.
POLICY E.2.	Provide and encourage the incorporation of art - both functional and decorative - in public and private development.

Sunnyvale General Plan Community Design Sub-Element:

Policy 2.5C.3:	Ensure that site design creates places, which are well organized, attractive, efficient and safe.
Action Statement 2.5C.3k.	Continue to require visible and attractive artworks for new private development at gateways and on large commercial and industrial properties.

DISCUSSION

The requirement to include art in private development is used by many communities to mitigate the sense of uniformity and loss of human scale that often accompanies commercial and industrial development projects. It can also be very effective in enhancing the visual landscape of a community. While strong design guidelines and high architectural standards are in place in Sunnyvale to encourage quality developments, unique features such as public art can be extremely effective in making one project stand out from the next.

In order to insure that there are legal and enforceable standards that will provide for continued unobstructed visibility of art that has been installed as a condition of development, it has been proposed that the art in private

development ordinance be amended. The purpose of the amendments would be to address situations where:

1. The artwork is stolen or irreparably damaged or destroyed by natural causes, vandalism or negligence by the property owner or their representative and;
2. Actions taken by the property owner at a later date may impair the public's ability to see the artwork.

It is important to note that any amendments to the art in private development regulation resulting from action taken on this report will not be retroactive. Any changes to the regulation cannot be used to remedy pre-existing situations where artwork has already been stolen or visibility of the artwork to the public has already been reduced or impaired.

Since 1990 there have been thirty-seven art in private development projects installed. Of the thirty-seven projects, three were required as conditions of development prior to the final adoption of the Art in Private Development Ordinance. Two are large-scale residential projects where art was required as a condition of development due to their location on principal avenues of travel; one at Lawrence Expressway and Lakeside Drive and the other at Oakmead Parkway and Lakeside Drive. Since 1990 there has been one documented theft of an artwork that had been required as a condition of development. This represents less than 3% of the total number of art in private development projects in the City.

1. REMOVAL OF ARTWORK FOR REASONS OTHER THAN REPAIR OR MAINTENANCE

The art in private development regulation states that no piece of required artwork may be removed, except for maintenance or repair. However, there are other situations that may cause an artwork to be "removed." For example, a natural disaster, such as an earthquake, may destroy an outdoor sculpture or negligence by a third party, such as when a subcontractor using heavy equipment backs into a tile mural causing permanent damage. In another scenario, a piece of art may be stolen from the front of a building, as was the case at one Sunnyvale company. The existing ordinance does not contain language that requires artwork to be replaced if it is stolen or damaged beyond repair.

a) Replacement of Art

To address the issue of artwork that is stolen, destroyed, or lost for any reason, Section 19.52.030 of the existing regulation may be modified to require the owner to replace the artwork.

The decision of whether to replace the artwork with an artwork by the original artist, using a similar design, or to submit an entirely new proposal to the Arts Commission could be left to the property owner. In either case, the property owner would replace the artwork in accordance with the procedures set forth in Section 19.52.060 of the art in private development ordinance for approval by the Arts Commission.

Pros:

- Unique features such as public art can be extremely effective in making one property stand out from the next, and it can enhance the visual and aesthetic quality of large-scale developments and those located on principal avenues of travel or “City gateways.” If an artwork has been stolen or irreparably damaged it can be argued that the visual and aesthetic quality of the development has been reduced.
- The incorporation of publicly visible artwork in large scale or highly visible development projects mitigates, in whole or in part, the sense of uniformity and loss of human scale and orientation, which can be generated by such projects. Requiring the replacement of artwork in such situations is in the public interest and welfare.

Cons:

- Property owners may believe that a requirement to replace public art is unreasonable and an unfair burden on their business, particularly when the reason they must replace the artwork is beyond their control as is the case if an artwork has been stolen or vandalized beyond repair.
- If the property owner does not carry insurance on the artwork, there may be a significant financial impact if an artwork must be replaced.
- Property owners will pass on the additional costs to their tenants by increasing rents and potentially making it more expensive to do business than in neighboring cities.

b) Replacement Value

If City Council decides to require replacement of stolen or irreparably damaged artwork, there are a number of alternatives that may be considered to determine what the value of any replacement art should be.

Alternative b.1 – Allow property owners to replace artwork using funds that may be received from a claim against their property insurance, plus any deductible amount. To determine the required value of replacement artwork, the total insured value of the original artwork at the time of its theft, destruction or loss, including any applicable deductibles would be used.

Pros:

- Most property owners carry insurance to protect them from theft, fire loss, earthquake damage and more. Artwork installed as a condition of development may be considered an asset to the property and as such could be covered under the property insurance. Insurance reimbursement would minimize the financial impact of having to replace stolen or irreparably damaged artwork.
- In a brief survey of several Sunnyvale property owners with artwork installed on their property, owners indicated that the artwork is insured under their General Property Insurance for theft and/or damage.

Cons:

- Replacement artwork may not be comparable in value to the original artwork even though it meets all of the other review criteria in the regulation.
- It is theoretically possible for the appraised (and subsequently insured) value of a piece of art to be significantly lower or higher than a replacement value that has been based on 1% of the construction valuation of an eligible development project.

Alternative b.2 - 1% of construction valuation of original project. *The City now requires that in eligible projects, the value of the required artwork must equal 1% (one percent) of the construction valuation of the development project, with any difference in the value of the artwork and the 1% valuation being contributed to the Public Art Fund. The same formula may be used to determine the replacement value of artwork that has disappeared or been irreparably damaged. The 1% calculation would be based on the original construction valuation of a project whether or not the 1% for art in private development requirement was in place at the time the original artwork was installed. The 1% figure would be reduced by any amount previously contributed to the Public Art Fund under Section 19.52.100(c) of the Municipal Code.*

Pros:

- This method is consistent with the formula used to determine the 1% for art requirement in eligible new private developments and City capital projects.
- Provides property owners and the City with a guideline to establish a replacement value that is comparable from project to project.
- A flat rate (fixed percentage) requirement provides equity between both large and small-scale properties.

Cons:

- The replacement value for properties with high construction valuations at the time the original artwork was purchased could be required to allocate a significant amount of money to replace stolen or irreparably artwork with something that is comparable in quality and scale to the original piece.
- The value of art in private developments is not available for artwork that was installed prior to adoption of the 1% for art requirement in May 2002.
- Records would need to be retained indefinitely documenting the construction valuation of every private development project that was required to include public art as a condition of development and staff would need to create a new administrative process to maintain this information in perpetuity.

Alternative b.3 - *Require the property owner to replace the artwork with something that is similar in scale to the original artwork and in keeping with the scope of development on the property regardless of the value of the artwork being replaced or the cost of the replacement artwork. A proposal would be presented to the Sunnyvale Arts Commission consistent with the review process contained in Section 19.52.080 of the existing regulation.*

Pros:

- This method is subjective; however, it is consistent with the process used prior to implementation of the 1% for art requirement and would allow the property owner more flexibility.

Cons:

- This method is subjective and replacement artwork may not be comparable in value to the original artwork even though it meets all of the other review criteria in the regulation.

c) Inflation

If City Council approves alternative b.1 above for calculating the value of replacement art, they may also want to consider whether or not to adjust the 1% valuation by inflation. Should Council chose to apply inflation, staff recommends that an amount equal to 1% of the construction valuation of the original development project be indexed using the Consumer Price Index (CPI) for the Greater Bay Area statistical area from the year the artwork was originally installed. The replacement artwork would be of equal or greater value than the artwork being replaced.

Council may also want to consider whether or not the inflation adjustment should be applied in perpetuity or if there should be a cap placed on the inflated value so that it is no more than a certain percent of the original valuation.

The following chart illustrates the potential impact of adjusting for inflation:

	Nominal (Original Value)	Indexed or Current Value	Nominal (Original Value)	Indexed or Current Value
1990	15,000	22,506	150,000	225,057
1995	15,000	19,611	150,000	196,108
2000	15,000	16,498	150,000	164,983
2004	15,000	15,000	150,000	150,000

Based on Source Information From: U.S. Dept. of Labor; BLS; Series ID CUURA422SA0, CUUSA422SA0 - All figures are based on the CPI for the San Francisco-Oakland-San Jose Metropolitan Statistical Area (MSA).

Pros:

- If inflation is applied to the original value of the artwork, the replacement piece is more likely to be similar to the original in material quality, scale and appropriateness to the overall scope of the site.

Cons:

- Using an inflation factor may place a disadvantage on current property owners as the cost to replace the artwork may in some cases be significantly more than the purchase price of the original artwork.
- Property owners could perceive inflation applied over an extended period of time as unreasonable or an inappropriate burden.
- Property owners may not have access to the resources necessary to replace an artwork.
- The public will presumably have had the benefit of the artwork for some period of time, so arguably the owner may be entitled to a discount. Such a discount would be provided by not adjusting for inflation.

d) In-Lieu Fee Alternative

In some instances, the siting of replacement artwork on a property may not be feasible. In such instances, the property owner may want to apply for the

in-lieu fee alternative as described in Section 19.52.100(b) of the Municipal Code. Under this section, developers may apply to the director of community development for an in-lieu fee alternative on projects that may include, but are not limited to, the following conditions:

- 1) Properties that have an obstructed view corridor from the public right-of-way due to existing landscaping, utility poles or existing buildings on adjacent property.
- 2) Properties that do not have an artwork location near the main entrance or street, either due to lack of space, existing trees and landscaping, required public easements, or existing utility pipes and electrical boxes.
- 3) Properties that lack a publicly visible location for art due to security restrictions.
- 4) Properties that do not have adequate space to incorporate public art.

Pros:

- Would fund art for public spaces and buildings where the installation of public art may have a more positive impact and higher visibility.
- Would provide additional funds to support the City's public art program and support the acquisition of public art that will be installed throughout the community.

Cons:

- Does not mitigate the impact of large-scale development on-site.
- Can potentially undermine the goal to place public art in both public and private settings.

e) Calculating the Amount of an In-Lieu Contribution to the Public Art Fund

The amount of an in-lieu contribution to the Public Art Fund may be calculated by any of the three methods described on pages 8-13 to calculate the replacement value of a stolen or irreparably damaged artwork. If the artwork being replaced was purchased after the 1% for art requirement was adopted in May 2002, the replacement value would be reduced by any contribution that had been made to the Public Art Fund. The balance could be indexed using the Consumer Price Index for the Greater Bay Area Statistical Area from the year the artwork was originally installed. Again, Council may want to consider a cap on the inflated value so that it is no more than a certain percent.

f) Insurance Requirement

During the Arts Commission Study Session on March 17, 2004, Arts Commissioners asked if it is possible to require property owners to carry insurance. It has been determined that the City may place an insurance requirement on a property owner to assure that there are adequate resources to repair or replace artwork that has been irreparably damaged or stolen.

The art in private development regulation could be amended to require property owners to maintain insurance covering the full replacement value for the artwork against theft, vandalism, damage or destruction. The full replacement value would be calculated by the insurance company based on the appraised value of the artwork adjusted to current dollars. The City may require the owner to provide satisfactory proof of insurance.

Pros:

- Placing a requirement to insure artwork as a condition of development at it's full replacement cost will assure that there are always funds available to the property owner to repair or replace damaged or stolen artwork.
- Most property owners carry insurance to protect them from theft, fire loss, earthquake damage and more. Artwork installed as a condition of development may be considered an asset to the property and as such could be covered under the property insurance. Insurance reimbursement would minimize the financial impact of having to replace stolen or irreparably damaged artwork.
- In a brief survey of several Sunnyvale property owners with artwork installed on their property, owners indicated that the artwork is insured under their General Property Insurance for theft and/or damage. It is unlikely that property owners would not carry general property insurance for theft and damage of their property, so the fiscal impact on business would be negligible.

Cons:

- Placing an insurance requirement on a developer or property owner may be perceived as onerous or an unnecessary regulation on business.
- The City does not require property owners to insure anything at this time. As there is no existing comparable regulation, a new administrative system would need to be developed to guarantee these requirements are met on an annual basis. The administration of these requirements on an on-going basis would be time-consuming and complex. Staff coordination and enforcement would be required. This would require additional budget for staff time and administration.

- Changes in insurance carriers, business or property ownership would add complexity in terms of having to contact and inform new parties about these ongoing requirements.
- To staff's knowledge, Sunnyvale would be the only city within the Bay Area region that would require on-going proof of insurance for art that has been installed on private property as a condition of development and could put Sunnyvale at a disadvantage when businesses are deciding where to locate.

2. CHANGING CONDITIONS ON A PROPERTY

The current regulations do not provide a property owner with the ability to address changing conditions on their property that may reduce or eliminate the public's ability to view art that was installed as a condition of development. For example, following the terrorist attacks on September 11, 2001, one major company decided to close their business campus to the general public. The company applied for a permit to install a security fence around the perimeter of the property and construct a security booth at the entrance to the parking lot. These changes limited public access to one of the three artworks that were required as a condition of development for this business complex. While two pieces remained outside the security perimeter, a sculpture located slightly within the campus adjacent to the main visitors' entrance was now located inside the security perimeter. Although the artwork remains partially visible from the street, members of the public may no longer walk up to the sculpture and view it at close range.

Staff worked with company representatives to develop an agreement that would allow the public to view the artwork. The process would allow the public to check in with the security guard, and view the fountain sculpture from their car in the visitors' vehicle turnaround. Unfortunately, this arrangement did not work on a day-to-day basis. On one day, two staff members were allowed to park their car and then walk into the campus to view the sculpture up close. On another day, an Arts Commissioner was not permitted to drive into the parking lot to view the sculpture from his car.

a) Changes to Visibility of Artwork in Approved Locations

Section 19.52.080 of the existing art in private development code states that art shall be easily visible from the public street and that the location must be exterior and in permanent view to both motorists and pedestrians. However, other locations may be approved upon a finding that is consistent with the intent of the ordinance. The existing regulation does not require the artwork to be physically accessible, only that it be publicly visible.

It is unlikely that an owner will restrict the physical accessibility of an artwork without also altering the visibility as originally approved by the Arts Commission. While an owner could argue that the artwork is still "visible"

through a new security fence, it is not *as easily* visible as it was when originally approved and is therefore no longer consistent with the terms of the ordinance.

Other actions taken by a property owner that could affect the visibility of artwork on a site, include redoing landscaping to plant bushes or trees that may then block the artwork from public view.

b) Remedies for the City

The existing art in private development regulation could be amended to include a section that would preclude a property owner from taking any action that alters the public visibility of the artwork as originally approved by the Arts Commission. If conditions on a property change significantly, such as there becomes a need to install a security fence, the property owner could be required to address reduced public visibility of an artwork in a number of different ways. By amending the ordinance, a property owner could apply to the City to follow one of three courses of action:

- One option would be to relocate the artwork on the existing site. A proposal of this nature would be reviewed and approved by the Arts Commission in accordance with the procedures set forth in Section 19.52.060.
- Another option would be to apply for an in-lieu fee alternative if the physical conditions of the site have changed to such a degree that the existing artwork cannot be relocated on the site in a publicly visible location. The owner may apply for an in-lieu fee alternative under Section 19.52.100(b). The amount of the in-lieu fee would be calculated using whatever formula is selected by Council for the replacement of stolen or irreparably damaged artwork. The three alternatives listed earlier in this report include:
 - 1% of the original construction valuation of the project, less any amount previously contributed to the Public Art Fund.
 - 1% of the original construction valuation of the project, less any amount previously contributed to the Public Art Fund and then adjusted for inflation.
 - The total insured value of the original artwork at the time of its theft, destruction or loss, including any deductibles.
- A third option would be to allow the property owner to apply to donate the artwork to the City. If the City accepts the donation, the property owner would be responsible for all costs associated with the relocation and installation of the artwork. In addition, the property owner would be responsible for the fabrication and installation of an identification plaque

designed to staff specifications. A legal document of transmittal, transferring title of the artwork would also be required.

This option would require that the existing Legislative Policy related to the loan or donation of artwork to the City would be amended to reflect this alternative. The City would be under no obligation to accept a donation however, in some cases property owners may only choose from the first two options. Please refer to Attachment C – Art Loan and Donation Legislative Policy- Proposed Revision.

Pros:

- Unique features such as public art can be extremely effective in making one property stand out from the next, and it can enhance the visual and aesthetic quality of large-scale developments and those located on principal avenues of travel or “City gateways.” If an artwork is removed from public view it can be argued that the visual and aesthetic quality of the development has been reduced.
- The incorporation of publicly visible artwork in large scale or highly visible development projects mitigates, in whole or in part, the sense of uniformity and loss of human scale and orientation, which can be generated by such projects. Again, it can be argued that removing artwork from the public view is not in the public interest and welfare.

Cons:

- Sunnyvale has a large number of companies working on sensitive projects. Some of these businesses may be located in a development project with art that was required as a condition of development and at some point may require a security fence to protect their assets. Restricting property owners and their tenants’ assets may put Sunnyvale at a disadvantage.

3. CIVIL PENALTIES

Chapter 1.05 allows the City to issue administrative citations and Chapter 1.06 allows the City to impose civil penalties for any violation of the Municipal Code. Currently only the Neighborhood Preservation Division has made use of this section. In order to enforce regulations related to the art in private development regulation, Council may consider imposing civil penalties if property owners do not abide by the terms imposed on them as a condition of development.

By amending the art in private development ordinance the City may, upon reasonable notice, perform all necessary repairs and maintenance to the artwork, secure insurance, or take such legal or other action deemed necessary to have the artwork maintained or repaired. The costs could be collected in the same manner that the costs of abating a nuisance are collected under Chapter

9.26 of the Municipal Code. This basically gives the City two options: (1) sue the owner to collect the costs as a debt, or (2) (the easier option), make the costs a tax lien which the owner must pay as part of its annual property tax bill. Additional language would also provide that failure to maintain *or replace* artwork could also subject the owner to administrative penalties under Chapter 1.06. This would be the most appropriate remedy if, for example, the artwork was stolen and not replaced, in which case the City has not incurred any actual costs, but the public has suffered "damage" as result of the loss of the art. The maximum penalty allowed is \$2,500 per day that the violation exists, up to \$100,000.

4. OTHER CHANGES IN THE ORDINANCE

In addition to the alternatives listed above, staff recommends that an additional amendment be made to the Art in Private Development Ordinance. The recommended change would require the property owner to record a document with the county recorder that would contain a description of the artwork and note the obligation to present and future property owners with regard to the maintenance, repair and replacement of art that has been required as a condition of development. This approach will ensure that as title to property changes hands, new owners are aware of the requirements associated with public art on their property.

5. PROPOSED AMENDMENTS TO THE ART IN PRIVATE DEVELOPMENT ORDINANCE

Staff recommends the following changes to the current Art in Private Development Ordinance. These amendments are identified in bold text in Attachment D – Municipal Code, Chapter 19.52 (with the Proposed Revisions Highlighted.) A revision of Section 19.52.030(b) provides that:

- a) The property owner shall maintain the artwork in good condition continuously after it is installed. Maintenance includes all necessary repairs and upkeep to the artwork, related landscaping, lighting and identification plaque.
- b) No piece of required artwork approved pursuant to this chapter shall be removed, except temporarily for required maintenance or repair, nor shall the owner take any action that alters the public visibility of the artwork as originally approved by the Arts Commission pursuant to Section 19.52.080, unless the owner first obtains the written approval of the City. Such approval may be conditioned upon replacement of the artwork in accordance with the procedures set forth in Section 19.52.060 for approval by the Arts Commission. In the event that the artwork is stolen, destroyed, or lost for any reason, the owner shall replace the artwork in accordance with the procedures set forth in Section 19.52.060 for approval by the Arts Commission.

- c) Where replacement of artwork is required by subsection (b)(3), but siting artwork on the property is no longer feasible due to changed physical conditions, the owner may apply for an in-lieu fee alternative under Section 19.52.100(b). The amount of the in-lieu fee shall be based on the full replacement value of the artwork.
- d) Failure to maintain the artwork as required by this Section is declared to be a public nuisance. If the artwork is not maintained in the manner prescribed, the City may, in addition to all other remedies provided by law, upon reasonable notice, perform all necessary maintenance and repairs, secure insurance, or take such legal or other action deemed necessary to preserve the artwork or restore it to good condition, and the costs therefor may be collected as provided in Chapter 9.26 as costs incurred to abate a public nuisance. Failure to maintain or replace artwork as required by this section may also subject to the owner to administrative citations under Chapter 1.05 and/or civil penalties under Chapter 1.06. Proceedings under Chapter 1.06 shall be heard by an appeals board designated by the City Manager. The Director of Parks and Recreation and the Director of Community Development shall have concurrent authority to enforce provisions of this section.
- e) The property owner shall record a document with the county recorder containing a description of the artwork and noting the obligation of present and future property owners with regard to the maintenance, repair and replacement of the artwork. Documentation must be provided to the City within thirty days of installation of the artwork.

FISCAL IMPACT

There may be some costs associated with the enforcement of this ordinance should enforcement be required; however, it is unlikely that there will be any significant costs associated with these regulations given the history of the program over the past thirteen years. Enforcement costs would be absorbed into the Neighborhood Preservation operating budget. If Council approves the alternative that would allow property owners to donate artwork to the City under certain conditions and restrictions, on-going maintenance costs would be incurred; however, the City's Public Art Fund could cover these costs.

INTER-DEPARTMENTAL COORDINATION

This report was prepared with cooperation between and input from the Planning and Economic Development Divisions of the Community Development Department, the City Attorney's Office and the Arts Unit in the Department of Parks and Recreation.

ENVIRONMENTAL REVIEW

This Study Issue is an activity with no possibility of a significant environmental impact, and therefore, no additional environmental review is required. (CEQA Guidelines Article 5, Section 15061(b)(3)).

CONCLUSION

The purpose of the Study Issue to “Provide Greater Enforcement of Art in Private Development” is to develop legal and enforceable standards to ensure continued public visibility and access to art installed as a condition of development. It is also to provide for the replacement of art that may have been irreparably damaged or stolen. While amendments can be made to the existing art in private development ordinance, any amendments resulting from action taken on this report will not be retroactive.

After developing various strategies and discussing them with local business representatives, staff has been unable to identify an alternative that Sunnyvale businesses will not perceive negatively. An alternate solution proposed by a local business representative was to have the City insure and maintain artwork on private property as it would likely be cheaper to insure art as part of a larger policy than on a business to business basis. If the City is unwilling to insure art on private property, the other alternative offered was to install the artwork in public right of ways and cover them under the City’s insurance policy. This latter alternative, however, would require revisiting the overall Art in Private Development policy recently explored by City Council, and that was not the focus of this study.

PUBLIC CONTACT

Staff invited a group of business owners, developers, and business groups’ to a meeting August 27, 2004. At this meeting staff provided information regarding the purpose of the study issue and requested feedback on alternatives being considered to address the issues included in the study. The general consensus of the group was that any additional requirements related to the provision of art in private development would send an unwelcome signal to the business community, particularly if the result was an increase to the cost of doing business in Sunnyvale. In our current economic downturn the City needs to be competitive with surrounding cities to retain and attract businesses and to help current businesses expand. The total cost of doing business is a more sensitive issue. The participants felt that these problems can be mitigated substantially by making good decisions up front about placement, security, and damage-resistance of pieces of art on private development projects. A summary of the meeting is included in this report as Attachment D: Notes from Meeting with Business Representatives on Greater Enforcement of Art in Private Development Requirements. A meeting was conducted with the

President and CEO of the Sunnyvale Chamber of Commerce on August 28, 2004. Feedback from this meeting was consistent with the opinions provided to staff during the meeting with other business representatives on August 27.

Public contact was made through posting of the Arts Commission, Planning Commission and City Council agendas on the City's official web page, publication of the Council agenda in the San Jose Mercury News, and the availability of the report in the City Clerk's office, Library, Parks and Recreation Administration, and in the lobbies of the Recreation Center and Senior Center at the Sunnyvale Community Center complex.

A copy of the draft Report to Council was sent to the Chamber of Commerce and they were invited to attend the public hearings conducted by the Arts Commission, Planning Commission and City Council.

On March 17, 2004, a Study Session on this issue was conducted with the Arts Commission. During their meeting, Commissioners raised a number of additional questions:

1. Are developers currently required to insure public art that has been installed as a condition of development? *(No, developers are not currently required to insure public art on their property.)* If not, is it possible to require property owners to carry insurance on their artwork, so that resources are available to replace stolen or damaged artwork? *(Yes, the City may legally require property owners to carry insurance on their artwork. The way to do this would be to amend the art in private development regulations.)*
2. If a property owner must replace stolen or damaged artwork or conditions of the site have changed to such a degree that artwork may no longer be publicly visible may the City offer the owner an in-lieu fee alternative at that time? *(Yes, the City may choose to offer an in-lieu fee alternative.)*

On September 20, 2004, the Planning Commission provided a public hearing on this matter during its regularly scheduled meeting.

On September 29, 2004, the Arts Commission held a public hearing on this matter during its regularly scheduled meeting.

TERNATIVES

1. Require property owners to replace artwork that is stolen or irreparably damaged. The artwork would be replaced with an artwork that is similar in scale and appropriate to the site in accordance with the process described in Section 19.52.030 of the art in private development ordinance. The decision of whether to replace the artwork with an artwork by the original

artist, using a similar design, or to submit an entirely new proposal to the Arts Commission could be left to the property owner.

2. The value of replacement art or in-lieu contribution would be based on the total insured value of the original artwork at the time of its theft, destruction or loss, including any applicable deductibles. If the artwork is not insured, use 1% of the construction valuation of the original project indexed to the Consumer Price Index for the Greater Bay Area. This amount would be reduced by the number of years that the public had an opportunity to enjoy the original artwork.
3. If replacement of stolen or irreparably damaged artwork on the property is no longer feasible, the property owner may apply for an in-lieu fee alternative under Section 19.52.100(b). The value of the in-lieu contribution to the Public Art Fund would be the full replacement value of the original artwork as assigned by the insurance provider. Property owners would be required to provide satisfactory proof of insurance within thirty days of installation of the artwork.
4. Allow property owners to address changing conditions which preclude the maintenance of artwork in its original location by providing three alternatives: (1) Apply to the Arts Commission to relocate the artwork to another site on the property as described in Section 19.52.030; (2) Apply for an in-lieu fee alternative as described in Section 19.52.100(b), and; (3) Apply to donate the artwork to the City of Sunnyvale and if accepted be responsible for all costs associated with the relocation and installation of the artwork. The City would then cover the on-going maintenance and repair costs using resources held in the Public Art Fund.
5. Amend Section 19.52.030(b) as follows: Amend Section 19.52.030(b) as follows: Failure to maintain the artwork as required by this Section is declared to be a public nuisance. If the artwork is not maintained in the manner prescribed, the City may, in addition to all other remedies provided by law, upon reasonable notice, perform all necessary maintenance and repairs, secure insurance, or take such legal or other action deemed necessary to preserve the artwork or restore it to good condition, and the costs therefore may be collected as provided in Chapter 9.26 as costs incurred to abate a public nuisance. Failure to maintain or replace artwork as required by this section may also subject the owner to administrative citations under Chapter 1.05 and/or civil penalties under Chapter 1.06. Proceedings under Chapter 1.06 shall be heard by an appeals board designated by the City Manager. The Director of Parks and Recreation and the Director of Community Development shall have concurrent authority to enforce provisions of this section.

6. Require the property owner to record a document with the County Recorder containing a description of the artwork and noting the obligation to present and future property owners with regard to the insurance requirement and maintenance, repair and replacement of art within thirty days of installation of the artwork.
7. Adopt the proposed amendments to the Art in Private Development Ordinance that will support the recommendations contained in this report.
8. Direct staff to take some other action related to the City's Art in Private Development Policy.
9. Take no action related to the City's Art in Private Development Policy.



COMMENDATIONS

Two incidents in recent years have focused attention on the original art in private development regulation and the absence of a requirement to replace artwork that is stolen, irreparably damaged or removed from the public view. In the body of this report, staff has provided a discussion of the benefits and the drawbacks of strengthening certain aspects of this regulation. In making specific recommendations for Council consideration, staff has tried to balance strategies that may be perceived by the business community as unreasonable requirements on private development, with the desire of the City to enhance the visual landscape of the community and mitigate the impact of large-scale developments. Additionally, staff focused on recommendations that would result in minimal staff time to enforce. For example, business representatives were opposed to the inclusion of a requirement that art that is required as a condition of development be insured; however, most (if not all) property owners carry general damage insurance to protect them from theft, fire loss, earthquake damage and more. A brief survey of several developers / property owners confirmed that the artwork on their premises is also insured, as was the case with the company whose artwork was stolen from the front of their building. It is not unreasonable to expect that this will be the case for most properties and if not, an alternative formula for calculation the replacement value is also provided.

Staff recommends Alternatives 1, 2, 3, 4, 5, 6 and 7.

1. Require property owners to replace artwork that is stolen or irreparably damaged. The artwork would be replaced with an artwork that is similar in scale and appropriate to the site in accordance with the process described in Section 19.52.030 of the art in private development ordinance. The decision of whether to replace the artwork with an artwork by the original artist, using a similar design, or to submit an entirely new proposal to the Arts Commission could be left to the property owner.

2. The value of replacement art or in-lieu contribution would be based on the total insured value of the original artwork at the time of its theft, destruction or loss, including any applicable deductibles. If the artwork is not insured, use 1% of the construction valuation of the original project indexed to the Consumer Price Index for the Greater Bay Area. This amount would be reduced by the number of years that the public had an opportunity to enjoy the original artwork.
3. If replacement of stolen or irreparably damaged artwork on the property is no longer feasible, the property owner may apply for an in-lieu fee alternative under Section 19.52.100(b). The value of the in-lieu contribution to the Public Art Fund would be the full replacement value of the original artwork as assigned by the insurance provider. Property owners would be required to provide satisfactory proof of insurance within thirty days of installation of the artwork.
4. Allow property owners to address changing conditions which preclude the maintenance of artwork in its original location by providing three alternatives: (1) Apply to the Arts Commission to relocate the artwork to another site on the property as described in Section 19.52.030; (2) Apply for an in-lieu fee alternative as described in Section 19.52.100(b), and; (3) Apply to donate the artwork to the City of Sunnyvale and if accepted be responsible for all costs associated with the relocation and installation of the artwork. The City would then cover the on-going maintenance and repair costs using resources held in the Public Art Fund.
5. Amend Section 19.52.030(b) as follows: Amend Section 19.52.030(b) as follows: Failure to maintain the artwork as required by this Section is declared to be a public nuisance. If the artwork is not maintained in the manner prescribed, the City may, in addition to all other remedies provided by law, upon reasonable notice, perform all necessary maintenance and repairs, secure insurance, or take such legal or other action deemed necessary to preserve the artwork or restore it to good condition, and the costs therefore may be collected as provided in Chapter 9.26 as costs incurred to abate a public nuisance. Failure to maintain or replace artwork as required by this section may also subject the owner to administrative citations under Chapter 1.05 and/or civil penalties under Chapter 1.06. Proceedings under Chapter 1.06 shall be heard by an appeals board designated by the City Manager. The Director of Parks and Recreation and the Director of Community Development shall have concurrent authority to enforce provisions of this section.
6. Require the property owner to record a document with the County Recorder containing a description of the artwork and noting the obligation to present and future property owners with regard to the insurance requirement and

maintenance, repair and replacement of art within thirty days of installation of the artwork.

7. Adopt the proposed amendments to the Art in Private Development Ordinance that will support the recommendations contained in this report.

The Planning Commission reviewed this report on September 20, 2004, and

The Arts Commission reviewed this report on September 29, 2004, and

Prepared by:

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Attachments

- A. 2004 Study Issue Paper: Provide for Greater Enforcement of Art in Private Development Requirements.
- B. Notes from Meeting with Business Representatives Regarding Greater Enforcement of Art in Private Development Requirements.
- C. Revised Art Loan and Donation Legislative Policy.
- D. Municipal Code: Chapter 19.52. With Proposed Modifications Highlighted.